

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 35

WCC No. 2007-1983

KEN HAGEMANN

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

NOTICE OF APPEAL FILED AUGUST 6, 2008

Summary: Petitioner developed an abdominal muscle strain after he ran up a flight of stairs and sprinted some distance to prevent an accident on a construction site. He subsequently developed pneumonia and a pulmonary embolism which he attributed to his industrial injury. Petitioner's treating physician testified that the pneumonia and pulmonary embolism were causally related to his industrial injury. Respondent accepted liability for the muscle strain but denied liability for Petitioner's pulmonary conditions, asserting that they were not caused by his industrial accident.

Held: Petitioner has met his burden of proving that it was more probable than not that his pulmonary conditions were caused by his industrial accident.

¶ 1 The trial in this matter was held on April 29, 2008, in Helena, Montana. Petitioner Ken Hagemann was present and was represented by Torger Oaas. Respondent was represented by Kelly M. Wills.

¶ 2 Exhibits: Exhibits 1, 3-4, 8-9, 11-12, and 14-17 were admitted without objection. During trial, the original photographs replaced copies as Exhibits 8 and 9. No exhibits were offered as Exhibits 10 or 18. Respondent objected to Exhibit 2 on the grounds that all of Dr. Hiebert's records should be excluded as argued in its motion in limine; Exhibit 2 was admitted over Respondent's objection. Petitioner withdrew Exhibit 5. The Court reserved ruling on Exhibit 6 at trial, and sets forth its ruling below. Exhibit 7 was not

admitted on relevancy grounds. Petitioner objected to Exhibit 13 on the grounds that Dr. Ross' independent medical examination report was hearsay, and it was admitted pursuant to Mont. R. Evid. 803(6) over Petitioner's objection.

¶ 3 Witnesses and Depositions: The deposition of Dr. Pamela Hiebert was taken and submitted to the Court, and can be considered part of the record. However, Respondent objected to Exhibits 4 and 5 to Dr. Hiebert's deposition on the grounds that these exhibits were not intended to be admitted by the parties but were included inadvertently. Exhibit 4 was withdrawn pursuant to stipulation of the parties. Exhibit 5 was admitted over Respondent's objection. Petitioner's deposition was submitted at the close of trial and can be considered part of the record. The deposition of Dr. Scott K. Ross was filed post-trial by stipulation of the parties and agreement of the Court. Petitioner, Kitty Hagemann, and Scott Phillip Houston were sworn and testified at trial.

¶ 4 Issue Presented: The Pretrial Order states the following contested issue of law:

¶ 4a Whether the pulmonary problems for which Petitioner first sought medical care on January 3, 2007 were caused by the industrial incident and the abdominal muscle strain he suffered on January 2, 2007.¹

¶ 5 Prior to trial, Respondent's motion for summary judgment was denied on the basis that material facts were in dispute in this case.² Two other motions – Respondent's Motion in Limine to Exclude Medical Opinion Evidence and Petitioner's Motion to Reconsider this Court's Order of March 27, 2008 – were denied prior to trial, but I noted at the time I denied these motions that I would more fully set forth my reasoning in the Findings of Fact, Conclusions of Law and Judgment in this matter.³ The reason for my denial of these motions is set forth below.

FINDINGS OF FACT

¶ 6 In January 2007, Scott Phillip Houston and Petitioner were working together on a job site in Bozeman which was known as the "black box theater project."⁴ Houston was the

¹ Pretrial Order at 2.

² E-Mail From Hon. James Jeremiah Shea To Counsel of Record (April 24, 2008), Docket Item No. 34.

³ E-Mail From Hon. James Jeremiah Shea To Counsel of Record (April 25, 2008), Docket Item No. 39.

⁴ Trial Test.

superintendent of the job site and Petitioner was the assistant superintendent.⁵ Petitioner had been working for Sletten Construction for approximately 13 years.⁶ Houston has worked for Sletten Construction for approximately 24 years. Houston estimated that he and Petitioner have known each other for about 20 years.⁷

¶ 7 Houston testified that in January 2007, the job site of the black box theater project extended out from the theater location to the sidewalk area that bordered the street. The crew had demolished the sidewalk, fenced the area, and posted signs announcing that the sidewalk was closed and directing pedestrians to a crosswalk. Inside the fence was an extensive excavation where the crew was connecting plumbing and electricity through an underground tunnel system. The excavation had caution tape strung around it.⁸

¶ 8 On January 2, 2007, Petitioner was in a work trailer which housed the project's office. He looked out a window and noticed a man walking a dog in the area where the sidewalk had been removed. He realized that it was a blind man with a seeing-eye dog. Petitioner wanted to stop the man because he was approaching a dangerous area.⁹

¶ 9 Petitioner left the trailer and ran up a flight of stairs, taking several stairs at a time. When he got to the top of the stairs, he began yelling for the man to stop and ran closer until the man heard him and stopped. Petitioner noticed "something moving" on the right side of his chest as he took the last few stairs. After he stopped the man, Petitioner caught his breath and went back to work, finishing his shift.¹⁰

¶ 10 Later that afternoon, Houston called and asked Petitioner to pick him up from an equipment rental business. When Petitioner arrived, he informed Houston that he had narrowly averted an accident and described running up the stairs to stop the pedestrian and seeing-eye dog. Houston testified that while he did not see the incident, he knew the stairs Petitioner ran up were not a regular flight of stairs but were large risers designed for

⁵ Petitioner Dep. 19:4-10.

⁶ Trial Test.

⁷ Trial Test.

⁸ Trial Test.

⁹ Trial Test.

¹⁰ Trial Test.

people to sit on.¹¹ Petitioner told Houston that he had a feeling he was going to be sore the next day from running up the stairs.¹²

¶ 11 After work that day, Houston, Petitioner, and some coworkers went out to dinner. Houston testified that Petitioner was sore, but not in any distress. After dinner, Houston returned to the hotel where he was staying and Petitioner returned to his camping trailer which he had parked in Bozeman while working on this job.¹³

¶ 12 Petitioner's memory of the evening of January 2, 2007, is fuzzy. He remembers taking a shower and going to bed, but he could not get comfortable to sleep. By about 3 a.m., Petitioner's pain was severe and he decided to get dressed and seek help. He was also having difficulty breathing. Petitioner was not able to get himself completely dressed and he called Houston for help.¹⁴

¶ 13 Houston's room phone rang at about 4:00 or 4:30 a.m. Houston answered the phone and heard a voice gasping and asking for help. At first, Houston thought it was a prank call, but then he realized it was Petitioner. Houston drove to Petitioner's trailer and found him sitting in a chair and gasping for breath.¹⁵

¶ 14 Houston helped Petitioner dress and drove him to the emergency room. Houston then went to the job site. Petitioner called him later that morning and asked to be picked up from the hospital. Houston took Petitioner back to his trailer and left him there to rest. Petitioner was told to take Ibuprofen for pain, so Houston purchased Ibuprofen and delivered it to Petitioner's trailer. Houston noticed that Petitioner was sore and tired, but he did not seem to be having trouble breathing.¹⁶

¶ 15 Petitioner could not rest comfortably in his trailer, so he decided to go to work after taking a few Ibuprofen. At the work trailer, he "took it easy," sitting at a table and studying construction plans.¹⁷

¹¹ Trial Test.

¹² Trial Test.

¹³ Trial Test.

¹⁴ Trial Test.

¹⁵ Trial Test.

¹⁶ Trial Test.

¹⁷ Trial Test.

¶ 16 At the work trailer, Houston thought Petitioner looked tired. Around 2 p.m., Houston suggested that Petitioner leave for the day. Petitioner decided to stay, but when Houston checked on him an hour later, Petitioner looked worse.¹⁸ Petitioner recalls that although he felt good at the time he went to work, his pain returned much worse than before. Houston testified that Petitioner was having difficulty breathing and was in extreme pain. Houston drove him to the emergency room where Petitioner was admitted to the hospital.¹⁹

¶ 17 On the afternoon of January 3, 2007, Petitioner was seen in the emergency room at Bozeman Deaconess Hospital by Douglas R. Elson, M.D. Dr. Elson reported that Petitioner's pain had increased in severity since he had been in the emergency room that morning. A chest x-ray and CT scan were performed, and a right lower lobe pneumonia was visible on the CT scan. Dr. Elson consulted with Pamela J. Hiebert, M.D., and Petitioner was admitted to the hospital.²⁰

¶ 18 Dr. Hiebert is board-certified in internal medicine, and has practiced internal medicine since 1985.²¹ She practices general medicine for adults as a primary care physician.²² On January 3, 2007, Dr. Hiebert was the internist on call.²³

¶ 19 Dr. Hiebert examined Petitioner when he was admitted to Bozeman Deaconess Hospital. In her history notes, Dr. Hiebert stated that Petitioner was in excellent health prior to sprinting 100 yards on the previous day to prevent a blind person from falling into a hole. She reported that Petitioner experienced pain in the upper right quadrant of his abdomen minutes after the sprint, and that the pain had localized in Petitioner's upper right abdomen, right lower chest, and right flank area with some radiation into the right shoulder. Dr. Hiebert noted that Petitioner did not sleep well the night before because of the pain and that Petitioner reported that the pain worsened overnight. Dr. Hiebert noted that Petitioner had visited the emergency room that morning and was sent home with pain

¹⁸ Trial Test.

¹⁹ Trial Test.

²⁰ Ex. 1 at 1-3.

²¹ Hiebert Dep. 5:10-12.

²² Hiebert Dep. 5:19 - 6:5.

²³ Hiebert Dep. 9:13-19.

relievers after his test results were normal. However, his pain continued to worsen and he returned.²⁴

¶ 20 After a physical examination, Dr. Hiebert's impression was that Petitioner had right upper quadrant abdominal pain probably due to pneumonia and diaphragmatic irritation. Her plan was to aggressively treat Petitioner's pain and pneumonia, and she would consider repeating a CT scan of his chest and abdomen since she was unable to give him contrast due to his high creatinine level.²⁵

¶ 21 A subsequent CT scan revealed that Petitioner had a pulmonary embolism.²⁶ Dr. Hiebert testified that she was concerned about a pulmonary embolism because Petitioner had chest pain following a trauma.²⁷ Dr. Hiebert testified that she would think about performing a CT scan in any case which involved any level of trauma and chest pain.²⁸ Dr. Hiebert testified that pulmonary embolisms can be difficult to diagnose, but internists are always looking for the condition because missing the diagnosis can have serious consequences.²⁹

¶ 22 Dr. Hiebert explained that a pulmonary embolism is a blood clot in one of the veins of the lungs, and a pulmonary infarct occurs when the blood clot is severe enough to cause part of the lung to die.³⁰ Dr. Hiebert testified that known risk factors for pulmonary embolisms include age, prolonged periods of immobilization, trauma, and surgery.³¹ A pleural effusion is a fluid collection around the lung, which may be caused by a trauma to the lung.³² She further testified that relatively minor incidents can cause pulmonary embolisms and deep venous thrombosis.³³ Dr. Hiebert also explained that deep venous

²⁴ Ex. 1 to Hiebert Dep. at 1.

²⁵ Ex. 1 to Hiebert Dep. at 2.

²⁶ Hiebert Dep. 21:22 - 22:4.

²⁷ Hiebert Dep. 66:3-7.

²⁸ Hiebert Dep. 31:12-17.

²⁹ Hiebert Dep. 30:4-21.

³⁰ Hiebert Dep. 10:19-23.

³¹ Hiebert Dep. 16:1-12.

³² Hiebert Dep. 11:3-6.

³³ Hiebert Dep. 16:13-14, 18:19-23.

thrombosis is a blood clot in a vein.³⁴ Dr. Hiebert explained that a blood clot in a vein anywhere in the body will move to the lungs, and that while lungs normally filter out blood clots, a large blood clot can be fatal.³⁵

¶ 23 Dr. Hiebert stated that while Petitioner was never diagnosed with deep venous thrombosis, a pulmonary embolism is caused by a clot which came from a vein and migrated to the lung. Therefore, a patient with a pulmonary embolism would have had a deep venous thrombosis which had traveled to the lung.³⁶ Dr. Hiebert opined that an incident such as Petitioner described – sprinting up a flight of stairs and pulling an abdominal muscle – is an event that would be a risk factor for deep venous thrombosis.³⁷

¶ 24 Dr. Hiebert opined that it was more probable than not that Petitioner's pneumonia, pulmonary embolism, pulmonary infarct, pleural effusion secondary to those conditions, and abdominal pain secondary to muscle fascial strain were caused by his industrial accident on January 2, 2007.³⁸ She also opined that it was more probable than not that a thrombus was caused by an injury to his abdomen.³⁹

¶ 25 Dr. Hiebert opined that Petitioner's pneumonia was caused by an infection.⁴⁰ She further testified that it remains her opinion that Petitioner was injured when he ran up the flight of stairs and pulled a muscle, leading to pulmonary embolism and pneumonia.⁴¹ She explained that the pulmonary embolism and pneumonia were not directly caused by running up a flight of stairs, but by the abdominal muscle strain.⁴² Dr. Hiebert further explained that an injury can cause pneumonia because if a person fails to take deep breaths, airways collapse and bacteria can grow, quickly leading to pneumonia.⁴³ She

³⁴ Hiebert Dep. 18:9-11.

³⁵ Hiebert Dep. 19:22 - 20:11.

³⁶ Hiebert Dep. 33:21 - 34:8.

³⁷ Hiebert Dep. 19:16-21, 21:5-12.

³⁸ Hiebert Dep. 70:17 - 71:1.

³⁹ Hiebert Dep. 71:2-6.

⁴⁰ Hiebert Dep. 50:4-6.

⁴¹ Hiebert Dep. 56:3-6.

⁴² Hiebert Dep. 56:15-18.

⁴³ Hiebert Dep. 59:4-7.

stated that when a person has a muscle strain injury in the chest or stomach area, the person does not take deep breaths because of the pain associated with doing so. When a person does not take deep breaths, airways collapse in the lungs, allowing bacteria to grow in those areas and causing pneumonia to develop. She testified that it is very common for people with a chest or abdominal injury to develop pneumonia.⁴⁴ Dr. Hiebert stated that she did not do specific medical research on Petitioner's case because it is within the standard of care for internal medicine and that it was a common occurrence and therefore did not require the type of research she would have performed if a patient presented with an uncommon medical condition.⁴⁵

¶ 26 Petitioner was discharged from the hospital on January 8, 2007. In her discharge summary, Dr. Hiebert noted that Petitioner had been diagnosed with pneumonia, pulmonary embolism, pulmonary infarct, pleural effusion secondary to those conditions, and abdominal pain secondary to muscle fascial strain.⁴⁶

¶ 27 On February 16, 2007, Respondent's claims examiner Mel Pozder wrote to Petitioner and informed him that Respondent was denying his claim on the grounds that Petitioner's pneumonia was not caused by his industrial accident.⁴⁷ Respondent subsequently accepted liability for Petitioner's abdominal strain injury and paid for Petitioner's initial emergency room visit.⁴⁸

¶ 28 On April 26, 2007, Dr. Hiebert wrote a "FOLLOW UP HOSPITALIZATION" record in which she stated that Petitioner's January 3, 2007, hospitalization was "clearly a worker's comp related injury." She noted that Petitioner's sprint caused him to strain a muscle which led to severe pain and splinting. "This was enough pain and splinting in the right lung to cause some atelectasis, a little pneumonia as well as pulmonary emboli. He did require hospitalization. The pulmonary emboli was clearly related to this episode . . ."⁴⁹ Dr. Hiebert also wrote a letter addressed "To Whom It May Concern" in which she stated that Petitioner pulled a muscle in his right side while sprinting to prevent those passing by from falling into a hole:

⁴⁴ Hiebert Dep. 62:4-22.

⁴⁵ Hiebert Dep. 59:14-24.

⁴⁶ Ex. 1 to Hiebert Dep. at 3; Ex. 1 at 6.

⁴⁷ Ex. 4.

⁴⁸ Ex. 5.

⁴⁹ Ex. 2 to Hiebert Dep.; Ex. 2.

He had severe splinting and did have pleuritic chest pain and then he subsequently developed shortness of breath and cough and was diagnosed with a pulmonary embolism. This was clearly all related, he does not have a history of pulmonary embolism and he does not have any risk factors for pulmonary embolisms prior to this episode. There is a clear cause and effect of his muscle strain causing the splinting, atelectasis, pneumonia, and pulmonary embolism, all in the same area – the right lower lobe of the lung.⁵⁰

¶ 29 Dr. Hiebert testified that prior to April 26, 2007, she had never written in her treatment notes that Petitioner's pulmonary embolism and pneumonia arose from his industrial injury because she thought it was apparent that it was a work-related injury.⁵¹ Petitioner testified that he did not ask Dr. Hiebert to write the "To Whom It May Concern" letter, but that she volunteered to do so after she learned that Petitioner's workers' compensation claim had been denied.⁵²

¶ 30 Dr. Scott King Ross is board-certified in occupational medicine as a medical review officer and as an independent medical examiner.⁵³ Dr. Ross testified that when he worked as a family practitioner in the early 1980s, he treated patients with pneumonia, but he does not recall ever treating a case of pulmonary embolism.⁵⁴

¶ 31 Respondent asked Dr. Ross to examine Petitioner and review his medical records.⁵⁵ Dr. Ross issued a report detailing his evaluation on August 3, 2007.⁵⁶ Dr. Ross explained that he understood that Petitioner ran up a flight of stairs to intercept a blind man who was in danger of falling into a hole. Based on his review of the records and his examination of Petitioner, he concluded that Petitioner strained a muscle as a result of this incident.⁵⁷

⁵⁰ Ex. 1 to Ross Dep. at 341.

⁵¹ Hiebert Dep. 38:22 - 39:5.

⁵² Trial Test.

⁵³ Ross Dep. 6:17-19, 7:15-19.

⁵⁴ Ross Dep. 11:3-13.

⁵⁵ Ross Dep. 11:20-25.

⁵⁶ Ross Dep. 12:6-12.

⁵⁷ Ross Dep. 19:1 - 20:1.

Dr. Ross opined that the medical records do not support a diagnosis of pulmonary infarct.⁵⁸ He opined that the medical records support a diagnosis of abdominal strain,⁵⁹ and that the diagnosis of pulmonary embolism is also supported by the medical records.⁶⁰ Dr. Ross also agreed that it was medically more probable than not that Petitioner had pneumonia when he first went to the emergency room on January 3, 2007.⁶¹

¶ 32 Dr. Ross testified that while it is apparent from the CT scan that Petitioner probably had pneumonia, in his opinion it is not probable that he would have developed pneumonia from running up stairs and sprinting a distance of 100 yards. Dr. Ross thus concluded it was not medically probable that Petitioner's pneumonia was caused by his industrial accident.⁶² Dr. Ross further concluded that it was not medically probable that Petitioner developed pneumonia after splinting. He stated that he attempted to research whether splinting could cause pneumonia, but he could not find any medical literature to support it.⁶³ Dr. Ross testified that he has never personally seen a patient who developed pneumonia from splinting.⁶⁴ Dr. Ross believes Petitioner's development of pneumonia subsequent to his industrial accident is simply coincidental in time.⁶⁵ Likewise, Dr. Ross opined that it was not probable that Petitioner developed a pulmonary embolism from his industrial injury.⁶⁶ Dr. Ross testified that to develop a pulmonary embolism, a person would need more than a minor trauma.⁶⁷

¶ 33 Dr. Ross reported his IME results on August 3, 2007. Dr. Ross summarized Petitioner's medical records which related to his January 2007 industrial accident and subsequent hospitalization. He also reviewed correspondence, Petitioner's First Report of Injury (FROI), an accident report, and a transcribed statement from Houston. In his

⁵⁸ Ross Dep. 17:8-13.

⁵⁹ Ross Dep. 18:6-12.

⁶⁰ Ross Dep. 18:18-23.

⁶¹ Ross Dep. 24:13-17.

⁶² Ross Dep. 28:1-23.

⁶³ Ross Dep. 32:1-9.

⁶⁴ Ross Dep. 33:14-18.

⁶⁵ Ross Dep. 37:25 - 38:4.

⁶⁶ Ross Dep. 47:17-20.

⁶⁷ Ross Dep. 52:1-3.

report, Dr. Ross noted that Petitioner had returned to limited work duties in February 2007 and to full-time unrestricted work in April 2007. Petitioner's last medical appointment related to the conditions for which he was hospitalized in January 2007 occurred in April 2007, and Petitioner reported to Dr. Ross that he had completely recovered.⁶⁸

¶ 34 Dr. Ross also responded to questions posed to him by Respondent's claims adjuster Mel Pozder. In response to her questions, Dr. Ross opined that Petitioner's myofascial strain was more probably than not caused by the industrial accident of January 2, 2007. However, Dr. Ross opined that none of Petitioner's pulmonary conditions were attributable to his industrial accident. Dr. Ross explained, "Per the current medical literature and the available medical records in this case, there is no pathophysiologic basis for linking the pulmonary condition to the work incident."⁶⁹

¶ 35 Dr. Ross further asserted that he had discussed the case with two pulmonologists and that neither of them knew of a correlation between a muscle strain and the pulmonary conditions. Dr. Ross concluded that Petitioner had reached maximum medical improvement for the myofascial strain with no permanent impairment and no need for further medical treatment.⁷⁰ Nothing in the exhibits submitted to this Court, however, substantiates Dr. Ross' consultation with pulmonologists. There is no record of what questions Dr. Ross asked, what the specific answers of the pulmonologists were, or whether the pulmonologists reviewed any records in connection with this case. I therefore find Dr. Ross' assertion about the pulmonologists' opinions to be entitled to little, if any, weight.

¶ 36 At his deposition, Dr. Ross reviewed his IME report and asserted that he continued to agree with the opinions he stated therein.⁷¹

¶ 37 On September 25, 2007, Dr. Hiebert wrote a letter reiterating her opinion that Petitioner's pneumonia and pulmonary embolism developed as a result of his January 2, 2007, industrial accident.⁷²

⁶⁸ Ex. 1 to Ross Dep. at 5-24.

⁶⁹ Ex. 1 to Ross Dep. at 21-23.

⁷⁰ *Id.*

⁷¹ Ross Dep. 53:16 - 54:2.

⁷² Ex. 11 at 12.

¶ 38 Respondent accepted liability for a muscle strain injury and has paid the medical bills for the initial emergency room charges of January 3, 2007.⁷³ Petitioner has fully recovered from his abdominal muscle strain.⁷⁴

Exhibit 6

¶ 39 Proposed Exhibit 6 consists of a medical journal article which Respondent objected to on the grounds of foundation, hearsay, and untimeliness. Respondent noted that it objected to the article during Dr. Hiebert's deposition, and that Dr. Hiebert did not rely on this article in reaching her opinions. Petitioner responded that Respondent questioned Dr. Ross about the article extensively during Dr. Ross' deposition, and that the article is attached as an exhibit to Dr. Ross' deposition.

¶ 40 Dr. Hiebert's own testimony establishes that she did not rely on the article in reaching her opinion. As a stand-alone exhibit, I find the article of no use one way or the other in reaching my conclusions. Therefore, although Respondent's objections were not made on relevancy grounds, I find the article to be properly excluded as irrelevant. Exhibit 6 is excluded.

Respondent's Motion in Limine

¶ 41 Respondent filed a motion in limine to exclude medical opinion evidence, in which it moved the Court to prohibit Petitioner from presenting any medical causation opinion evidence from Dr. Hiebert.⁷⁵ In its brief in support, Respondent argued that Dr. Hiebert's opinions regarding the causation of Petitioner's pulmonary conditions lack scientific foundation and do not satisfy the requirements for admissibility. Respondent argues that Dr. Hiebert admitted in her September 25, 2007, letter that her medical causation opinion is unsupported, and further argues that no medical literature supports Dr. Hiebert's conclusions. Respondent argues that Dr. Hiebert's opinion that Petitioner's industrial accident caused his pulmonary problems is novel scientific evidence and thus must be subjected to the *Daubert* test⁷⁶ for admissibility, and that Dr. Hiebert's opinions would fail to qualify as admissible evidence under this test. Respondent further argues that Dr. Hiebert does not opine that Petitioner's conditions were more likely than not caused by his

⁷³ Pretrial Order, Statement of Uncontested Fact, ¶ 2.

⁷⁴ Ross Dep. 53:10-14.

⁷⁵ Motion in Limine to Exclude Medical Opinion Evidence and Supporting Brief ("Motion in Limine"), Docket Item No. 21.

⁷⁶ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

industrial accident, but only that they may have or could have been, and that this is not admissible as a medical expert's opinion.⁷⁷

¶ 42 Petitioner responds that Respondent mischaracterizes Dr. Hiebert's testimony, as she opined that Petitioner's pulmonary conditions were more probably than not caused by his industrial accident. Petitioner further asserts that at least one peer-reviewed journal article supports Dr. Hiebert's opinion that a minor trauma may cause a pulmonary embolism.⁷⁸

¶ 43 In reply, Respondent acknowledges that Dr. Hiebert opined that it was more probable than not that Petitioner's pulmonary conditions were caused by his industrial accident, but Respondent argues that it is not using "the magic words" but whether Dr. Hiebert's opinions were based on adequate foundation that determines their admissibility. Respondent further noted that it has consistently objected to the admission of the journal article to which Petitioner referred in his response brief because Dr. Hiebert testified at her deposition that she did not rely on the article and no foundation was laid for it as an exhibit.⁷⁹

¶ 44 As noted above, Dr. Hiebert is board-certified in internal medicine. She is Petitioner's treating physician, and she qualifies as a treating physician under § 39-71-116(37)(a), MCA. Although Respondent insists in its opening brief that Dr. Hiebert did not opine that it is more probable than not that Petitioner's conditions were caused by his industrial accident, in its reply brief, Respondent concedes that Dr. Hiebert did, in fact, render such an opinion. Respondent simply disagrees with Dr. Hiebert's opinion. Respondent further argues that Dr. Hiebert's opinions lack foundation. As Petitioner's treating physician and as a doctor who treats pneumonia and pulmonary embolisms as a regular part of her practice, however, Dr. Hiebert testified at length regarding her treatment of Petitioner and the basis for her opinions. To the extent Respondent believes her opinion lacks foundation, I believe this goes to the weight of Dr. Hiebert's opinion and not its admissibility. Respondent's motion in limine is therefore denied and Dr. Hiebert's medical testimony is admitted.

Petitioner's Motion to Reconsider

⁷⁷ Motion in Limine, Docket Item No. 21.

⁷⁸ Petitioner's Response to Respondent's Motion in Limine, Docket Item No. 31.

⁷⁹ Respondent's Reply Brief in Support of Motion in Limine to Exclude Medical Opinion Evidence, Docket Item No. 35.

¶ 45 On January 7, 2008, Petitioner moved this Court to amend his Petition for Hearing to add claims for attorney fees and a penalty.⁸⁰ On January 16, 2008, Petitioner filed a brief in support of his motion to amend, arguing that his motion was timely filed and should therefore be granted.⁸¹ Respondent filed its objection to Petitioner's motion to amend on January 23, 2008, arguing that Petitioner's motion to amend was not timely filed as it was due January 4, 2008, and that Petitioner had not given any justification for his motion to amend. Respondent asserted that it would be severely prejudiced if Petitioner's motion to amend were granted as trial was set for the February 11, 2008, trial week docket. Respondent stated that it would not oppose Petitioner's motion to amend if the case were set over to the next trial docket.⁸² Petitioner agreed to set the case over to the next trial docket and a new scheduling order was issued, giving Petitioner until February 11, 2008, to file his amended petition.⁸³ On January 31, 2008, the Court issued an Order Granting Motion to Amend Petition for Hearing; Order Resetting Scheduling Order, which stated, **"Petitioner's counsel must file the amended petition for hearing by February 11, 2008."**⁸⁴

¶ 46 The Court received Petitioner's proposed Amended Petition for Hearing on March 27, 2008. On that date, I issued an order returning the proposed amended petition as untimely.⁸⁵

¶ 47 On April 17, 2008, Petitioner moved this Court to reconsider the order returning his proposed amended petition.⁸⁶ In his brief in support of this motion, Petitioner's counsel conceded that he had no "super excuse" for his untimely filing of his proposed amended petition, but asserts that his staff failed to calendar the order properly. Petitioner argued that Respondent would not be prejudiced if he were allowed to file his motion because Respondent was aware of Petitioner's contentions in January when his motion to amend

⁸⁰ Motion to Amend Petition for Hearing, Docket Item No. 7.

⁸¹ Brief in Support of Motion to Amend, Docket Item No. 8.

⁸² Respondent's Response in Opposition to Petitioner's Motion to Amend, Docket Item No. 9.

⁸³ Order Granting Motion to Amend Petition for Hearing; Order Resetting Scheduling Order ("Order Granting Motion"), Docket Item No. 10.

⁸⁴ Order Granting Motion, Docket Item No. 10 at 1. (Emphasis in original.)

⁸⁵ Order Returning Amended Petition for Hearing as Untimely, Docket Item No. 13.

⁸⁶ Petitioner's Motion to Reconsider this Court's Order of March 27, 2008, Docket Item No. 25.

was filed and when Petitioner filed his particularization of his grounds for claiming attorney fees and a penalty.⁸⁷

¶ 48 On April 25, 2008, I informed the parties that I was denying Petitioner's motion to reconsider as I did not find good cause to grant the motion. At the time, Respondent had not yet filed its response brief, but I noted that since ARM 24.5.337 does not allow a reply brief in support of a motion for reconsideration, Petitioner's argument was fully submitted. However, I allowed Respondent the opportunity to file a brief in opposition if it so chose to preserve the record for appeal.⁸⁸ Respondent did not elect to file a response brief.

¶ 49 Petitioner was given leave to amend his petition but he failed to act upon that permission within the time given him by the Court. Having failed to take advantage of the leave that was given, Petitioner offers no compelling reason why the Court should revisit this issue yet again. Therefore, his motion for reconsideration is denied.

Post-Trial Evidentiary Issues

¶ 50 At the time of trial, an electronic version of Dr. Ross' deposition had been submitted to the Court, but the final printed version was not yet available. The Court and the parties agreed that Dr. Ross' deposition could be submitted post-trial and that the case would then be considered submitted for decision.⁸⁹ However, on May 20, 2008, counsel for Respondent wrote a letter to the Court in which he stated that the filing of Dr. Ross' deposition had been delayed because the court reporter was unable to obtain a complete copy of Dr. Ross' file which had been identified as Exhibit 1 to his deposition.⁹⁰ Respondent's counsel filed an affidavit in which he attested that he had reviewed the documents which were sent from Dr. Ross' office and purported to be a complete copy of his file, and that his review revealed that certain documents which were provided to Dr. Ross and which Dr. Ross brought to his deposition were not included in the documents subsequently sent as the exhibit. Respondent's counsel contacted Dr. Ross' office and informed his staff that documents were missing from the file. Dr. Ross was also directly contacted regarding the missing documents. However, Dr. Ross' office failed to locate the

⁸⁷ Brief in Support of Petitioner's Motion to Reconsider this Court's Order of March 27, 2008, Docket Item No. 26.

⁸⁸ E-Mail From Hon. James Jeremiah Shea To Counsel of Record (April 25, 2008), Docket Item No. 39.

⁸⁹ Minute Book Hearing No. 3938, Docket Item No. 42.

⁹⁰ Letter from Kelly M. Wills to Hon. James Jeremiah Shea (May 20, 2008), Docket Item No. 44.

missing documents, and Respondent's counsel forwarded the incomplete file to the court reporter on May 20, 2008.⁹¹

¶ 51 Dr. Ross' deposition was submitted to the Court on May 23, 2008.⁹² On that date, Petitioner's counsel wrote to the Court objecting to Dr. Ross' deposition being filed as Dr. Ross' credibility was at issue since he testified at his deposition that he reviewed certain documents which were subsequently not found in his file.⁹³

¶ 52 Respondent informed the Court that the documents missing from Dr. Ross' file include a copy of Dr. Hiebert's deposition, some correspondence from Dr. Hiebert and from Petitioner's counsel, and certain medical abstracts. Respondent points out that these items are discussed in Dr. Ross' deposition.⁹⁴ Indeed, Dr. Ross' deposition testimony makes it readily apparent that the now-missing documents were in front of Dr. Ross while he was questioned by counsel.⁹⁵ While Petitioner urges this Court to exclude Dr. Ross' deposition because the missing exhibits allegedly impugn the credibility of Dr. Ross' assertion that he reviewed these documents, Dr. Ross' deposition leaves no doubt that those documents were in front of Dr. Ross and referred to by him during his deposition and that those documents were lost some time after the deposition testimony was taken. Although these documents are now missing from Dr. Ross' file, copies of these documents are elsewhere in the record as exhibits before this Court.

¶ 53 I am not persuaded that the loss of these documents requires the exclusion of Dr. Ross' deposition. Dr. Ross' deposition is therefore admitted into evidence.

CONCLUSIONS OF LAW

¶ 54 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.⁹⁶

⁹¹ Affidavit of Kelly M. Wills, Docket Item No. 45.

⁹² Deposition of Scott K. Ross, M.D., Docket Item No. 46.

⁹³ Letter from Torger Oaas to Hon. James Jeremiah Shea (May 23, 2008), Docket Item No. 47.

⁹⁴ Letter from Kelly M. Wills to Hon. James Jeremiah Shea (May 20, 2008), Docket Item No. 44.

⁹⁵ Ross Dep. 12:17 - 15:1.

⁹⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶ 55 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁹⁷ I conclude that he has done so in this case.

¶ 56 The cause of Petitioner's pulmonary conditions comes down to the conflicting opinions of two physicians. Petitioner's treating physician, Dr. Hiebert, maintains that Petitioner's conditions stem from his industrial accident while Respondent's IME doctor, Dr. Ross, maintains that they do not.

¶ 57 It is well-settled that the treating physician's opinion generally carries greater weight in workers' compensation determinations.⁹⁸ However, the treating physician's opinion is not conclusive and this Court remains the finder of fact.⁹⁹

¶ 58 In this case, Respondent has argued that Dr. Hiebert is not qualified to render the opinions she has offered regarding the cause of Petitioner's conditions. Respondent has further argued that those opinions lack credibility and urges the Court to be persuaded by the opinions of Dr. Ross, its own expert witness. While Respondent has attacked Dr. Hiebert's expertise, Respondent's own IME doctor has never treated a pulmonary embolism, and has not treated a case of pneumonia since the early 1980s. Dr. Hiebert is a board-certified internist who sees pneumonia and pulmonary embolisms as a regular part of her practice. Not only does Dr. Hiebert's opinion carry greater weight because she was the treating physician in this case, but I also find her qualifications regarding the diagnosis and treatment of pneumonia and pulmonary embolism to be more substantial than Dr. Ross'.

¶ 59 In addition to Dr. Hiebert's medical testimony, the testimony of both Petitioner and Scott Phillip Houston support the history taken by Dr. Hiebert. I therefore conclude that the evidence is sufficient to meet Petitioner's burden of proving that it is more probable than not that the pulmonary problems for which he sought treatment on January 3, 2007, were caused by his January 2, 2007, industrial accident.

JUDGMENT

¶ 60 Respondent's motion in limine is DENIED.

⁹⁷ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

⁹⁸ *EBI/Orion v. Blythe*, 281 Mont. 50, 57, 931 P.2d 38, 42 (1997).

⁹⁹ *Kloepfer v. Lumbermen's Mut. Cas. Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996).

¶ 61 Petitioner's motion for reconsideration is DENIED.

¶ 62 Petitioner's objection to filing Dr. Ross' deposition is DENIED.

¶ 63 The pulmonary problems for which Petitioner first sought medical care on January 3, 2007, were caused by the industrial incident and the abdominal muscle strain he suffered on January 2, 2007.

¶ 64 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 10th day of July, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Torger Oaas
Kelly M. Wills
Submitted: May 23, 2008